FILED

No. 71-1687

Supreme Court, U. S.
FILED
JUN 26 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1972

EAST TEXAS STEEL CASTINGS
COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS
BOARD

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J. D. McLaughlin of
FISHER, McLAUGHLIN &
HARRISON, Paris, Texas
ATTORNEY FOR PETITIONER

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions Presented	2
Statute involved	3
Statement of case	3
Reasons for Granting Writ	5
First Question Restated	5
Argument and Authorities	5
Second Question Restated	8
Argument and Authorities	9
Conclusion	10
Appendix	11

CITATIONS

CASES:

NLRB v Dan River Mills, Inc. (C.A.5) 274 F 2d 381	6
NLRB v Downtown Bakery Corp. (C.A.6) 330 F 2d 921	6
NLRB v Laney & Duke Storage Warehouse Co. (CA5) 369 F 2d 859	9
NLRB v Mayes Bros., Inc. (C.A.5) 383 F 2d 242, 248	9
NLRB v Southern Coach & Body Co (C.A.5) 336 F 2d 214	6, 7

Skyline Homes, Inc. vs NLRB
(C.A.5) 323 F 2d 642 6

STATUTE:

National Labor Relations Act as amended, 29 U. S. Code Annotated, Sections 151 et seq.

Section 8(a)(5) 5
Section 8(d) 3, 9
Section 10(e) 2

IN THE SUPREME COURT OF THE

UNITED STATES

No. _____

EAST TEXAS STEEL CASTINGS COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

East Texas Steel Castings Company, Inc., acting by and through its undersigned counsel, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on April 20, 1972 enforcing an order issued by the Board against East Texas Steel Castings Company, Inc. The petitioner duly filed a Motion for Rehearing, which motion was denied on May 18, 1972.

OPINIONS BELOW

The opinion of the Court below is not yet reported but is attached hereto, together with the judgment and order denying Petitioner's Motion for Rehearing as Exhibit A.

The Trial Examiner's Findings and Conclusions and the Board's Decision contrary thereto are reported at 191 NLRB No. 28, and attached hereto as Exhibit B.

JURISDICTION

The Court below entered its judgment on April 20, 1972. The jurisdiction of this Court is invoked under the provisions of Section 1254 Title 28 U. S. Code Annotated, and under Section 10(e) of the National Labor Relations Act as amended.

QUESTIONS PRESENTED

First Question: Whether or not an employer is bound to sign a labor agreement where a good faith doubt exists concerning Union majority representation before an agreement is reached and more than one year has elapsed since certification.

Second Question: Whether or not an employer violates the National Labor Relations Act by failing to sign an agreement when no demand is made on it for signature.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended, 29 U. S. Code Annotated, Sections 151 et seq. are as follows:

"Section 8(d) Duties of Parties in Collective Bargaining.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such does not compel either party to agree to a proposal or require the making of a concession."

STATEMENT OF THE CASE

On May 2, 1969, the International Molders and Allied Workers Union, Local 58, AFL-CIO

hereinafter referred to as the Union, was certified by the Board as the collective bargaining representative for the production and maintenance employees of the Petitioner, East Texas Steel Castings Company, Inc., hereinafter called Company. This certification occurred after an election among the employees in the bargaining group, in which election out of 158 employees in the bargaining unit, there were 98 votes cast for the Union and 34 votes cast against the Union.

Thereafter, the Company and the Union met on numerous occasions and no agreement was reached as to a contract, and an economic strike occurred on July 27, 1969. At this time 109 employees were out on strike and 32 employees remained in the employment of the Company. The strike lasted until January 12, 1970. During the course of the strike 60 new employees were hired. By May, 1970, there was a total of 90 employees employed by the Petitioner made up of 32 employees who did not strike, 30 employees who were hired during the course of the strike, and 28 employees who had returned following the strike, and by this time all economic strikers had been offered reemployment by the Petitioner.

Following the strike, the Company had continued to meet with the Union but no agreement had been reached. On or about May 12, 1970 the Petitioner advised the Union that it doubted that it represented a majority of its employees. The Union on May 14, 1970 sent a telegram on behalf of Local 358 stating that it unconditionally accepted the terms of the contract. No demand was made

upon Petitioner to sign the contract. The Petitioner refused to recognize the contract in that it did not believe a Union majority any longer existed and filed a decertification petition with the National Labor Relations Board.

The Union filed a charge with the Board claiming that the Petitioner had violated Section 8(a)(5) of the Act by refusing to sign the contract. Whereupon a complaint was issued charging Petitioner with violating the Act by having failed to sign the contract. And it is in this state that the matter proceeded to hearing before the Board and appears before this Honorable Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

First Question Restated: Whether or not an employer is bound to sign a labor agreement where a good faith doubt exists concerning Union majority representation before an agreement is reached and more than one year has elapsed since certification.

ARGUMENT AND AUTHORITIES

The holding of the Court below completely ignores this question presented to it, the Court deciding the case solely on the question of

failure of the employer to sign the agreement, which will be discussed later herein.

Nevertheless, whether or not Petitioner violated the Act by not signing the contract under the facts of this case is academic in that at the time the Union accepted the contract, it no longer represented a majority of the employees of the Petitioner, or at least the Petitioner had every reason to doubt the same, and there would be no obligation on its part to sign a contract even if a demand were made. The holding of the Court below by being silent on this question is contrary to several cases decided by Circuit Courts of Appeals heretofore, including at least three cases decided by the Fifth Circuit Court of Appeals, see NLRB vs Southern Coach & Body Company (C.A.5) 336 F 2d 214; Skyline Homes, Inc. vs NLRB (C.A.5) 323 F 2d 642; NLRB Vs Dan River Mills, Inc. (C.A.5) 274 F 2d 381; NLRB v. Downtown Bakery Corp. (C.A.6) 330 F 2d 971.

The Board in its decision makes the statement that the employer contended that the majority was lost subsequent to the Union's contract acceptance. The statement is erroneous. The employer contended, and has all the time contended, that the Union lost its majority status before the contract was accepted. This became abundantly clear to the employer by May, 1970 when all economic strikers had been offered reemployment. (See excerpts from Transcript attached hereto as Exhibit C) The witness, Williams, Petitioner's plant manager, verified his good faith belief that the Union no longer represented a majority of the employees by reference to a payroll period and

date of May 17, 1970 and the Board has erroneously used that date as the date when Petitioner claims the Union had lost its majority. In fact, the Company notified the Union on May 12, 1970 of its claim of loss of majority.

The record clearly shows that by the end of the certification year, that is May 2, 1970, only twenty-eight of the employees who supported the strike were on Petitioner's payroll, and petitioner had sixty-two employees that it had every reason to believe were not Union adherents in that they remained at work during the course of the strike or had been hired during the course of the strike.

The cases that have heretofore been decided by the Appeals Courts on this subject repeatedly hold:

> "Although it is a general rule that the majority status of a Union is presumed to exist at the end of the certification year, the Courts have repeatedly asserted that an employer is justified in refusing to recognize a Union after the year has ended if the employer entertained a good faith reasonable doubt that the Union no longer represents a majority of the employees." NLRB vs Southern Coach & Body Company, 336 F 2d 214,219.

The opinion of the Court below is at variance and contrary to this established principle of law, for which reason this Writ of Certiorari should be granted.

The record is abundantly clear that in fact the Union did not represent a majority of the Petitioner's employees from the time of the end of the strike, that is, January 12, 1970. The law is equally clear at the end of the certification year, that is, May 2, 1970 the Union no longer occupied a representative status, and the petitioner was not only justified in no longer recognizing the Union, but morally, and perhaps legally, obligated to do such.

Thus, the effort on the part of the Union to accept a contract theretofore in dispute after the end of the certification year and when the employer had a good faith doubt of majority representation of the Union and had so advised the Union, is a nullity. This, notwithstanding the fact that the purported telegram of acceptance was sent in behalf of local 358 when the certified union was local 58 (See Exhibit E attached)

The injustice done herein was the Board's refusal to process Petitioner's decertification petition and thereby ascertain the wishes of the employees after the end of the certification year and the change of the employees.

Second Question Restated Whether or not an employer violates the National Labor Relations Act by failing to sign an agreement when no demand is made on it for signature

ARGUMENT AND AUTHORITIES

This Honorable Supreme Court should grant a Writ of Certiorari in this case because the decision of the Court Below is contrary to Section 8(d) of the National Labor Relations Act and other cases heretofore decided by Circuit Courts of Appeals, namely, NLRB vs Mayes Bros., Inc. (C.A. 5) 383 F 2d 242 and NLRB v. Laney & Duke Storage Warehouse Co. (C.A. 5) 369 F 2d 859.

As heretofore pointed out, the complaint in this cause was narrowly drawn, charging Petitioner with violating Section 8(a)(5) of the Act by refusing to sign an agreement. (See page 2 of Exhibit C hereto attached)

The applicable section of the Act above quoted requires the execution of an agreement if requested by either party. An attempt was made to accept this contract by a telegram sent in behalf of local union 358 with no demand being made for signature. (Exhibit E hereto attached) The record is silent as to any communication being received by the Company whereby the Union requested signature and the Trial Examiner so found.

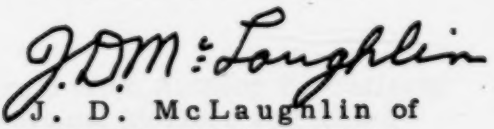
The Act clearly requires execution of a contract only after execution is requested. To find that an employer has violated the Act by failure to sign the contract indulges in the assumption that the employer should have known that the Union wanted the contract signed and

the assumption that it would not have signed the contract had it been requested. This not only heaps assumption upon assumption but also is more than is required by the National Labor Relations Act. Failure to sign a contract under the terms of the Act, and that is what we are here dealing with, can constitute a violation of the Act by the terms written therein by Congress only if signature is requested.

CONCLUSION

The Court below has decided in substance by silence two important questions under the National Labor Relations Act in a manner which conflicts with the statute and with the decisions theretofore rendered by that Court and other Courts of Appeals. Therefore, this Petition for Writ of Certiorari should be in all things granted.

Respectfully submitted,



J. D. McLaughlin of
FISHER, McLAUGHLIN &
HARRISON
Liberty National Bank Bldg.
Paris, Texas 75460
ATTORNEY FOR PETITIONER

APPENDIX

EXHIBIT A

(1) Opinion of Court Below
(2) Judgment
(3) Order denying Motion for Rehearing

EXHIBIT B

Trial Examiner's Findings and Conclusions and Board's Decisions

EXHIBIT C

Excerpts from Transcript of Proceedings

EXHIBIT D

Excerpts from the Complaint

EXHIBIT E

Copy of telegram from Anthony F. Cafferky Counsel for International Molders and Allied Workers Union, dated May 15, 1970.

EXHIBIT A (1)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3300

Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

EAST TEXAS STEEL CASTINGS COMPANY, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(March 29, 1972)

Before BELL, DYER, and CLARK, Circuit Judges.

PER CURIAM: We enforce the order of the Board in this matter. We find ample support in the record for the conclusion that the employer refused to sign an agreement with the certified bargaining representative of the employees although agreement was

---

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

reached as to the terms and the employer was requested to sign. The trial examiner found apparent authority in counsel for the employer to negotiate the agreement and bind the employer therein. The employer did not except to this finding by the trial examiner in seeking Board review and thus we will not now consider the contention of no authority. 19 USCA, § 160(e). See *National Labor Relations Board v. Cheney California Lumber Company*, 1946, 327 U.S. 385, 899-89, 66 S.Ct. 533, 90 L.Ed. 739.

All other contentions of the employer have been considered and are without merit.

ENFORCED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT A (2)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner	
v.	
	No. 71-3300
EAST TEXAS STEEL CASTINGS COMPANY, INC., Respondent	

JUDGMENT

Before: BELL, DYER and CLARK, Circuit Judges.

THIS CAUSE was submitted upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, East Texas Steel Castings Company, Inc., its officers, agents, successors, and assigns on June 14, 1971. The Court having carefully considered the briefs and transcript of record filed in this case, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on March 29, 1972, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order

of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, East Texas Steel Castings Company, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: APR 20 1972

EXHIBIT A (2)

EXHIBIT A (3)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-3300

Summary Calendar

NATIONAL LABOR RELATIONS BOARD,
Petitioner

Versus

EAST TEXAS STEEL CASTINGS
COMPANY, INC., Respondent

Application for Enforcement of an Order of the National Labor Relations Board (Texas case)

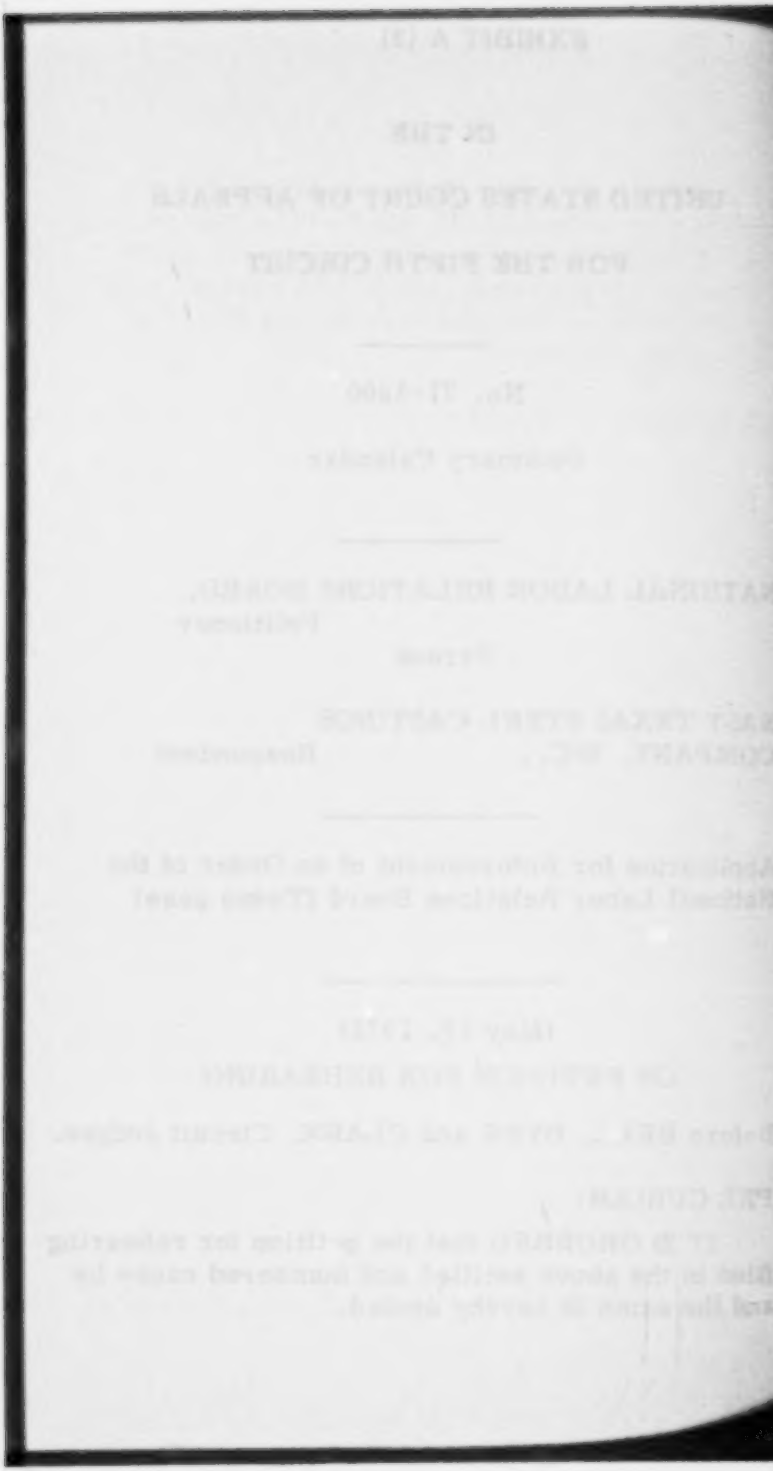
(May 18, 1972)

ON PETITION FOR REHEARING

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.



[¶23,134] EAST TEXAS STEEL CASTINGS COMPANY, INC. and INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, LOCAL 58, AFL-CIO.

191 NLRB No. 28, Case No. 16-CA-4059, Alvin Lieberman, Trial Examiner.

June 14, 1971.

Before MILLER, FANNING and BROWN.

J. D. McLaughlin (Fisher, McLaughlin & Harrison, on brief), Paris, Tex., for Employer. Anthony F. Cafferky, Washington, D. C., for Union. Charles H. Huey for NLRB.

Bargaining Agreements—Validity of Acceptance—Clerical Error—Need for Ratification

A union's unconditional acceptance of an employer's proposed contract terms was not nullified by a clerical error creating a reference to Local 358, rather than Local 58. Nor was the acceptance invalidated by the union's failure to seek ratification of the agreement from its general membership or unit employees. Accordingly, nonacceptance of the agreement was not a defense to a refusal to execute the agreement. Section 8(a)(5).—Back references ¶ 3095.52 and 3130.47.

Bargaining Duty—Execution of Written Agreement—Loss of Union Majority Allegation

A union's alleged loss of an employee majority, as evidenced by the return of only 28 strikers to a unit of 95 employees, was immaterial to a charge that an employer unlawfully refused to sign a bargaining agreement. The employer's request for the union to sign a proposed contract and the union's unconditional acceptance of the proposed terms established that an agreement had been reached prior to exhaustion of a preferential hiring list for strikers. Section 8(a)(5).—Back reference ¶ 3095.275.

Bargaining Duty—Execution of Written Agreement—Absence of Formal Request

An employer was aware of a union's continuing demand for execution of a bargaining agreement, as evidenced by the parties' correspondence. The employer had invited the union to sign a proposed agreement and the union had unconditionally accepted the agreement effective immediately. Therefore, the failure of the union's formal requests for execution to reach the employer did not excuse the employer's refusal to sign the agreement. No formal request is required if the party refusing to sign is otherwise aware of the demand for execution. Section 8(a)(5) and (d).—Back reference ¶ 3095.255.

Bargaining Duty—Execution of Written Agreement—Unfair Practice Charge as Request

A union's filing of an unfair practice charge and the issuance of a complaint, alleging that an employer had unlawfully refused to sign a previously reached bargaining agreement, put the employer on notice that the union wanted it to execute the contract. The charge and the complaint were also sufficient by themselves to constitute a request for execution. Accordingly, the employer's refusal to sign was unlawful. Section 8(a)(5) and (d).—Back reference ¶ 3095.255.

Trial Examiner's Findings and Conclusions

An employer, engaged in the production, sale and distribution of steel castings, was charged with refusing to sign a bargaining agreement in violation of Section 8(a)(5) of the Act.

During a strike over a failure to reach an agreement, a union asked the employer's chairman of the board to meet with it. The chairman said that he was not familiar with the situation, but advised the union to meet with the employer's lawyer and managers. He expressly stated that the employer's lawyer could negotiate for and bind the employer.

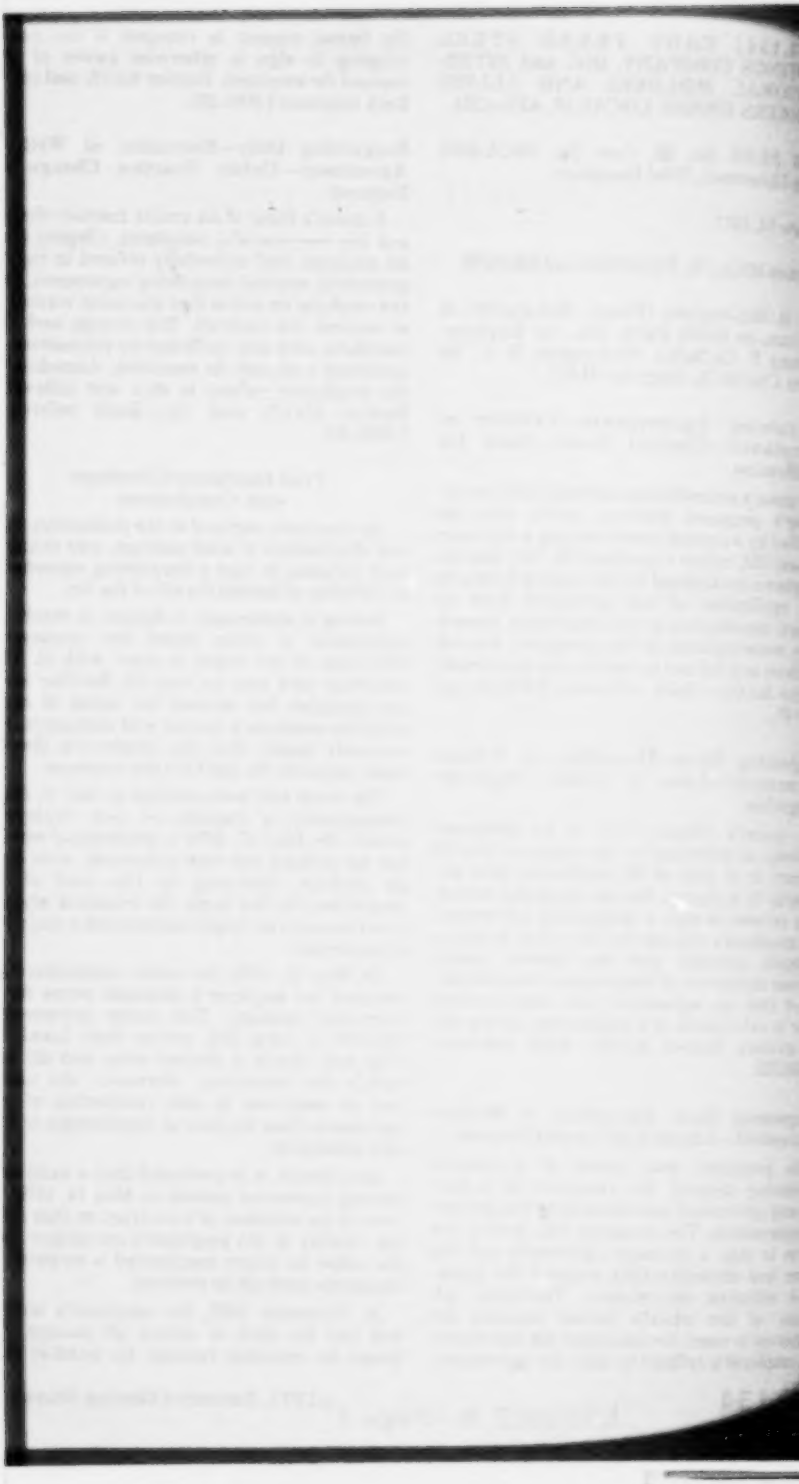
The union had been certified on May 2, 1969. Subsequently, a majority of unit employees struck. On May 17, 1970, a preferential hiring list for strikers had been exhausted, with only 28 strikers returning to the unit of 95 employees. On this basis, the employer argued that the union no longer represented a majority of employees.

On May 14, 1970, the union unconditionally accepted the employer's proposed terms for a three-year contract. The notice erroneously referred to Local 358, rather than Local 58. This was clearly a clerical error and did not nullify the acceptance. Moreover, the union had no obligation to seek ratification of the agreement from its general membership or the unit employees.

Accordingly, it is concluded that a valid bargaining agreement existed on May 14, 1970. In view of the existence of a contract on that date, the validity of the employer's contention that the union no longer represented a majority of employees need not be resolved.

In November 1969, the employer's lawyer had told his clerk to return all postage due letters for economic reasons. He testified that

©1971, Commerce Clearing House, Inc.



COPY

e had no knowledge as to which letters were eturned. On May 26, 1970, the union wrote to he lawyer to request a meeting for signing the ew contract. The letter was rejected because here was 20 cents postage due. A subsequent equest by letter was apparently not received y the lawyer.

It is, therefore, concluded that the union ever successfully requested that the employer ign the agreement. Under Section 8(d) of the ct, such a request must be made before xecution of an agreement is required. Accordngly, the employer's refusal to sign the agreeent did not violate Section 8(a)(5) of the Act.

Board's Decision

The Board agrees with the Trial Examiner hat the employer and the union reached omplete agreement on the terms of a barining contract on May 14, 1970. However, ontrary to the Trial Examiner, the Board is atisfied that the union was at all times deanding execution of the contract and that the mployer was aware of it.

Section 8(d) of the Act defines collective barining as including execution of a contract if equested by either party. The obligation to gn a contract does not arise automatically hen the agreement is reached. "The Act conemplates that a party request execution of a ntract document in order to bring the obgation to sign into play. However, the Act ither requires nor defines a specific manner which such a request must be manifested. ll that is necessary is that the party refusing sign be aware of the other party's request for rmal execution of the agreement."

The union was certified on May 2, 1969. In uly, employees struck after no agreement was eached. In January 1970, the employees ended he strike and agreed to accept the employer's last offer. The employer's lawyers agreed to ubmit the agreements reached during egotiations.

However, a misunderstanding developed er the length of the contract. The employer anted a three-year contract; the union a one-ear contract. In April, the lawyer wrote to the nion to express the hope that it would sign a hree-year contract. On May 14, the union sent telegram stating that it was unconditionally ccepting the terms of the contract proposed by he employer for a three-year period, effective mediately. Accordingly, the agreement came nto existence at that time.

However, within a week, the employer ought to repudiate the agreement. It claimed hat the employer's new owners had not eviewed the agreement, and that the union no onger represented a majority. It contended that the majority was lost subsequent to the union's contract acceptance.

On these facts, it is clear that the employer was always aware of the union's insistence that it sign the agreement. Therefore, the union's unsuccessful effort to make a formal request for execution was not fatal.

Subsequently, the employer asserted meritless grounds for not signing the agreement and the union filed an unfair labor practice charge. The filing of the charge and the issuance of the complaint put the employer on notice of the union's desires. They are sufficient to constitute a request to sign. At the hearing, the employer indicated that it did not intend to sign and questioned the effectiveness of union requests by mail.

Accordingly, the intent of both the employer and the union were clear. Therefore, the refusal to execute the agreement was unlawful. The employer's alleged doubt of the union's majority is immaterial, since at the time agreement was reached the employer had no basis for questioning the union's majority.

[¶ 23,135] BRICKLAYERS INTERNATIONAL UNION, LOCAL NO. 1, OF KENTUCKY, AFL-CIO et al. and PANKOW CONSTRUCTION COMPANY et al.

191 NLRB No. 31, Case No. 9-CD-224, Francis A. Keenan, Hearing Officer.

June 15, 1971.

Before FANNING, BROWN and KENNEDY.

Work Assignments—Fact Finding—Installation of Precast Walls—Effect of Prior Decision

On the facts and in light of a prior decision involving similar facts, the installation of precast concrete walls in a building under construction was properly assigned to a composite crew of carpenters and ironworkers rather than to a composite crew of bricklayers and ironworkers. The facts that the assignment was consistent with the employer's past practice, the employer was satisfied with the performance of the composite crew, and efficiency and economy of operations resulted from such an assignment supported the award. Section 10(k).—Back reference ¶ 5230.68.

OUND CLOSE IN CENTER

EXHIBIT C

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

BEFORE THE NATIONAL LABOR RELATIONS BOARD - SIXTEENTH REGION

In the Matter of	)	
EAST TEXAS STEEL CASTINGS COMPANY	)	
and	)	Case No. 16-CA-4059
INTERNATIONAL MOULDERS AND ALLIED WORKERS, Local 58, AFL-CIO	)	

ROSS WILLIAMS

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

* * * *

Q. (By Mr. McLaughlin) Mr. Williams, by whom are you employed? A. East Texas Steel Castings Company.

Q. Here in Longview? A. Yes, sir.

Q. How long have you been employed by them? A. Twenty-one years.

Q. What is your job? A. Works Manager.

* * * *

Q. (By Mr. McLaughlin) Did there come a time in the year 1970 when you formed an opinion as to whether or not the union represented the majority of the employees, or did not?

* * * *

A. Yes.

Q. Do you recall when you formed such an opinion? A. About May, 1970.

* * * *

Q. (By Mr. McLaughlin) What was that opinion you formed in about May, 1970? A. Well, we had 109 people -

TRIAL EXAMINER: What was your opinion?

Q. (By Mr. McLaughlin) What was your opinion as to whether or not, in your opinion, the untion didn't represent a majority of your employees? A. My opinion was that they didn't represent the majority.

Q. What did you base that opinion on? A. On the fact that 109 people who had gone out on strike, were sent certified letters offering reemployment, and only 28 accepted. Eighty-one of them refused.

TRIAL EXAMINER: You sent certified letters to 109 strikers offering them reemployment and 28 accepted?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: In other words, 28 abandoned the strike?

THE WITNESS: The strike was over. See, this was in 1970, and we were rehiring.

TRIAL EXAMINER: When did the strike end?

THE WITNESS: January 12th.

TRIAL EXAMINER: And what happened in January and May?

THE WITNESS: After the strike was over, I started replacing people who left from the strikers.

TRIAL EXAMINER: You mean you were replacing people who you hired during the strike?

THE WITNESS: Yes, sir, taking the oldest employees first.

TRIAL EXAMINER: How did you happen to send these 109 letters in May?

THE WITNESS: Oh, I didn't send them in May.

TRIAL EXAMINER: When did you send these letters?

THE WITNESS: As I needed them, only from shortly after the strike until the end of May.

TRIAL EXAMINER: And 28 of these people accepted?

THE WITNESS: Yes, sir. Of the 109.

TRIAL EXAMINER: One hundred and nine of the strikers?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Twenty-eight accepted.

THE WITNESS: Eighty-one of them refused.

Q. (By Mr. McLaughlin) Was there any other evidence or any other thing upon which you based your opinion that you formed in May, 1970 that the union did not represent a majority of your employees? A. Based on the fact that something like 32 employees did not strike, and we had hired, during that time, something like 60 people during the strike.

* * * *

Q. At this time, how many employees, I am talking about in May of 1970, how many employees did East Texas Steel Castings Company have? A. In May, about 90.

Q. About 90? A. Eighty-five or ninety.

Q. Those 85 or 90 employees were made up of approximately how many employees that continued to work during the strike, how many employees that came back and took reinstatement, and how many new employees? A. There was about 32 who did not strike, and the 28 who had come back at that

time. The rest of them were hired during the strike.

* * * *

Q. Mr. Williams, prior to the strike that testimony shows occurred in about July of 1969, and my memory is July 27th, how many employees were employed at East Texas Steel Castings Company? A. Immediately prior?

Q. Yes. A. About 150.

Q. About 150? A. Yes.

Q. And I am talking about employees within the bargaining unit, production and maintenance unit, is that what your answer refers to? A. Yes. You mean immediately preceding this strike?

Q. Yes, say about July 16th, 1969. A. Slightly over 150, as I recall.

Q. At the time of the termination of the strike, which we fixed at about January 10th, 1970, about how many employees were employed in the bargaining unit at East Texas Steel Castings Company? A. Total number of employees at that time?

Q. Yes. A. Ninety people.

Q. Ninety people? A. Yes, sir.

Q. How has that employment level continued since that date up to the present? That is, has it been up or down or remained about the same, or what, from January 10th, 1970, up to the present? A. Approximately the same.

ROSS WILLIAMS

having been previously duly sworn, resumed the stand and testified as follows:

CROSS EXAMINATION

* * * *

Q. I believe you testified that in July, 1969, a 109 of the Respondent's production and maintenance employees, or the employees in the untion, went out on strike.
Is that correct? A. Yes.

Q. Also that 32 of the Respondent's production and maintenance employees did not go out on strike, they remained in. A. Yes, sir.

Q. Now, from January 12th, that's the date the strikers came out to the plant and offered to return to work, until this day in May that you formed your opinion as to the union's lack of majority status; how many of the striking employees had been offered their jobs back? A. All of them.

EXHIBIT D

EXCERPTS FROM THE COMPLAINT

BEFORE THE NATIONAL LABOR RELATIONS BOARD - SIXTEENTH REGION

EAST TEXAS STEEL CASTINGS COMPANY		
and		
INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, LOCAL 58, AFL-CIO		Case No. 16-CA-4059

COMPLAINT AND NOTICE OF HEARING

* * * *

10.

Commencing on or about May 21, 1970, and at all times thereafter, the Respondent did refuse, and continues to refuse to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees in the unit described above in paragraph 6, by its conduct, on and after May 21, 1970, in refusing and continuing to refuse, to sign a written agreement embodying rates of pay, wages, hours of employment, or other conditions of employment agreed upon between the Respondent and the Union on or about May 14, 1970.

* * * *

12.

By the acts described in paragraph 10, and by each of said acts, the Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

EXHIBIT E

1970 MAY 15 AM 7 53

J. D. McLAUGHLIN, DLY 75
Liberty National Bank Bldg Paris Tex=

RE EAST TEXAS STEEL CASTING COMPANY INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION ON BEHALF OF LOCAL 358 UNCONDITIONALLY ACCEPTS TERMS OF CONTRACT PURLOSED BY THE COMPANY FOR A THREE YEAR PERIOD COMMENCING IMMEDIATELY. UNION HAS THIS DATE WITHDRAWN UNFAIR LABOR PRACTICIES CHARGES FILED APRIL 22ND 1970=

ANTHONY F. CAFFERKY COUNSEL
FOR INTERNATIONAL MOLDERS
AND ALLIED WORKERS UNION

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1687

EAST TEXAS STEEL CASTINGS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 457 F. 2d 879. The Board's decision and order (Pet. App. Exhibit B) are reported at 191 NLRB No. 28.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1972 (Pet. App. A2), and the company's petition for rehearing was denied on May 18, 1972 (Pet. App. A3). The petition for a writ of certiorari was filed on June 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company refused to sign an agreement previously reached with the certified representative of its employees, thereby violating Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3. Section 8(a)(5) is also relevant, and provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board's Findings of Fact

On May 2, 1969, the Union [1] was certified by the Board as the bargaining representative of the Company's employees (A. 79-80; 106, 121; 67).[2] The parties were unable to reach a collective bargaining agreement, however, and as a result the employees struck on July 28, 1969 (A. 107, 121; 10, 51, 53-54). The strike ended on January 10, 1970, when the employees voted to accept the Company's last offer (A. 108; 84). After being advised of the vote, Company spokesman J. D. McLaughlin informed the Union that he would "put to-

---

[1] International Molders and Allied Workers Union, Local 58, AFL-CIO.

[2] "A." refers to the appendix to the briefs in the court below.

gether the agreements and understandings reached during the negotiations" and submit it to the Union (A. 85-86; 121).

During the ensuing correspondence between the Company and Union it developed that there was a misunderstanding concerning the duration of the agreement. The Union believed that the parties had agreed to a one-year contract term, but the Company insisted that they had agreed to a three-year term. Thereafter, on February 12, with the duration issue still unsettled, McLaughlin mailed the proposed contract and a covering letter to the Union, stating in the letter that "we will be glad to meet with you and sign the enclosed contract, or it can be handled by mail" (A. 121, 109; 89).

On April 11, the parties met again in an unsuccessful attempt to resolve their differences over the contract term (A. 121; 30). In a letter to the Union dated April 25, McLaughlin reiterated that the Company was not interested in signing a one-year contract but hoped the Union would "sign the three year agreement with us." (A. 97-98; 121-122).

On May 14, the International Union sent a telegram to McLaughlin stating that "on behalf of Local 358 [sic] [it] unconditionally accepts terms of contract proposed by the Company for a three year period commencing immediately" (A. 94; 110). On May 21, McLaughlin replied that, since the Company's "new owners" never had an opportunity to review the agreement, it was being sent to them for "review and advice" (A. 95; 122). In addition, the letter raised for the first time the Company's doubts as to the Union's

majority status and questioned the propriety of entering into a contract with the Union (A. 95; 122).

On May 26, two weeks after the Union had notified the Company of its unconditional acceptance of the contract, the Union sent a registered letter to McLaughlin offering to meet with him to execute the agreement (A. 96; 17; 110). The letter was returned a week later, acceptance having been refused because there was twenty cents postage due (A. 110-111; 17-18). One week later, the same letter was sent to McLaughlin's office by regular mail in an unmarked envelope, without a return address. McLaughlin did not receive this letter. (A. 111; 18, 70.) [2]

B. The Decisions Below

The Board concluded that the Company violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to sign an agreement previously reached with the certified representative of its employees (A. 123-124). The Board found that, despite the Union's unsuccessful effort to make a formal request for signing through the mail, "at all times material the Respondent had been duly notified of the Union's insistence upon execution of the contract" (A. 123). Accordingly, the Board ordered the Company to execute, deliver, and give effect to the contract between it and the Union (A. 124).

The court of appeals, in a *per curiam* decision, enforced the Board's order. It stated "[w]e find ample

---

[2] The trial examiner concluded that, while a contract had been made on May 14, the Union had not "effectively requested [the Company] to sign" (A. 114). Accordingly he found that the Company had not violated Sections 8(a)(5) or (1) of the Act.

support in the record for the conclusion that the employer refused to sign an agreement with the certified bargaining representative of the employees although agreement was reached as to the terms and the employer was requested to sign" (Pet. App. A1).

ARGUMENT

1. The record in this case does not present the first question stated in the petition (Pet. 2)—whether "an employer is bound to sign a labor agreement where a good faith doubt exists concerning Union majority representation before an agreement is reached and more than one year has elapsed since certification." For the Board found, and the court of appeals sustained its finding, that the Company did not challenge the Union's majority status until May 21, seven days after the Union sent its telegram of acceptance and the contract between the parties was made (A. 122).[4] The Board

[4] The Company's contention (Pet. 7) that it notified the Union on May 12 of its claim of loss of majority is apparently based on reference to a May 12 letter contained in its letter of August 21 (A. 99). The Trial Examiner implicitly discredited that evidence in finding that there was no communication between the parties from April 21 to May 14 (A. 109-110). Moreover, even if timely, the Company's claim of loss of majority was predicated solely upon the amount of employee turnover. However, it is well settled that "[o]f itself turnover is no evidence of loss of majority status by the Union." *National Labor Relations Board* v. *John S. Swift Company*, 302 F. 2d 342, 345 (C.A. 7); *National Labor Relations Board* v. *Frick Company*, 423 F. 2d 1327, 1330-1332 (C.A. 3); *National Labor Relations Board* v. *Little Rock Downtowner, Inc.*, 414 F. 2d 1084, 1091 (C.A. 8); *National Labor Relations Board* v. *Rish Equipment Company*, 407 F. 2d 1098, 1100-1101 (C.A. 4); *Celanese Corp. of America*, 95 NLRB 664, 673.

concluded that the Company's May 21 letter asserted "nonmeritorious legal grounds for its refusal to sign" (A. 123). Accordingly, the only issue actually presented is whether the Board's finding that the Company lacked a good faith doubt regarding the Union's majority status is supported by substantial evidence. Such a factual question does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the evidence amply supports the Board's finding (*supra,* pp. 2-4, A. 122-123).[5]

2. Similarly, the second question raised in the petition is not presented by the record in this case (Pet. 3) —whether "an employer violates the National Labor Relations Act by failing to sign an agreement when no demand is made on it for signature." For the Board found that "continuously since May 14, 1970, [the Union] was insisting upon execution of the agreement and that the Respondent, fully aware of the Union's position, was seeking its abrogation" (A. 123). The court of appeals held that this finding was supported by substantial evidence (Pet. App. A1). This factual issue likewise does not warrant further review.

---

[5] There is no substance to petitioner's contention (Pet. 5-6) that the court of appeals ignored this question. The court specifically ruled that "[a]ll other contentions of the employer have been considered and are without merit" (Pet. App. A1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HAROLD J. ENGEL,
Attorney,
National Labor Relations Board.
AUGUST 1972.

☆ U.S. Government Printing Office: 1972—473-101/50